IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CORINNA LYNNE BAEHM-NOBLE, Appellant, v. MUNICIPALITY OF ANCHORAGE, Appellee.	Court of Appeals No. A-12555 Trial Court No. 3AN-14-11569 CR MEMORANDUM OPINION No. 6796 — June 5, 2019

Appeal from the District Court, Third Judicial District, Anchorage, Jo-Ann M. Chung, Judge.

Appearances: Shelley K. Chaffin, Law Office of Shelley K. Chaffin, Anchorage, for the Appellant. Sarah E. Stanley, Assistant Municipal Prosecutor, and William D. Falsey, Municipal Attorney, Anchorage, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

Corinna Lynne Baehm-Noble appeals her conviction for operating under the influence pursuant to Anchorage Municipal Code (AMC) 09.28.020(A). On appeal, Baehm-Noble raises two claims.

First, Baehm-Noble argues that the trial court erred in admitting recorded excerpts from an administrative hearing related to her case. Second, Baehm-Noble

argues that there was insufficient evidence to support her conviction. Having reviewed the record, we reject Baehm-Noble's claims and affirm her conviction.

Underlying facts

Around 11:30 p.m. on December 20, 2014, Anchorage Police Officer Patrick Gilbert performed a traffic stop of a vehicle. The driver of the vehicle, later identified as Baehm-Noble, smelled of alcohol and had bloodshot eyes. Gilbert asked Baehm-Noble if she had been drinking, and Baehm-Noble reported that she had consumed one beer.

Baehm-Noble subsequently performed poorly on several field sobriety tests — the horizontal gaze nystagmus test, the alphabet test, and a test that required her to count backwards from 69 to 54. (Gilbert decided not to ask Baehm-Noble to perform the one-leg stand or walk-and-turn tests after she reported that she suffered from severe impairment in her back and left leg.) Later in the stop, when Officer Gilbert asked again what alcohol Baehm-Noble had consumed, Baehm-Noble said that she drank a Maker's Mark with Sprite approximately four hours before she was stopped. She denied that she had previously told Gilbert that she drank a beer.

Baehm-Noble also told Gilbert that she was on ten different medications. When asked if she should be driving while taking those medications, Baehm-Noble responded that she was allowed to drive.

Gilbert told Baehm-Noble that he believed that she had consumed too much alcohol, and he placed her under arrest. The police impounded the vehicle that Baehm-Noble had been driving. Baehm-Noble's breath sample registered .066 percent on the DataMaster approximately one hour after Gilbert conducted the traffic stop.

Proceedings

The Municipality of Anchorage charged Baehm-Noble with operating under the influence.[1] Baehm-Noble's case eventually proceeded to a jury trial.

Prior to trial, however, an administrative impoundment hearing was held regarding the vehicle that Baehm-Noble had been driving. Baehm-Noble was not the owner of this vehicle, but she appeared as a witness at the hearing on the owner's behalf.

During this hearing, Baehm-Noble told the hearing officer that she had been taking ten different medications since 1993 and that she took all of these medications every day, four times a day. Baehm-Noble provided the hearing officer with a list of her medications, to which the hearing officer responded, "Okay these are — included on this list are some very, very strong controlled substances — methadone, oxycodone, hydrocodone." In response, Baehm-Noble informed the officer that she had been on much stronger medication in the past. Baehm-Noble also told the hearing officer that she was authorized to drive while taking all of her medications and that her doctor had advised her that she could have one drink.

At the outset of Baehm-Noble's criminal trial, the prosecutor indicated that he intended to play portions of the administrative hearing, arguing that Baehm-Noble's statements during the hearing were admissible as statements of a party opponent under Alaska Evidence Rule 801(d)(2). The prosecutor also argued that Baehm-Noble's medication list was admissible because she brought the document to the hearing in support of her contention that she was on medication at the time of the stop.

Baehm-Noble's attorney argued that Baehm-Noble's statements about taking medication, and the list of medications she provided to the hearing officer, were hearsay and not admissions that Baehm-Noble was impaired. Baehm-Noble's attorney

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[1] AMC 09.28.020(A).

also argued that this information was irrelevant or cumulative because Baehm-Noble also told Officer Gilbert that she was on medication, and the jury would hear this statement during the trial.

After reviewing the audio recording of the administrative hearing, the trial judge concluded that Baehm-Noble's statements to the hearing officer were admissible as statements of a party opponent. However, the judge found that the medication list (which included several medications that were not commonly known) would be confusing to the jury and overly prejudicial, so the judge excluded that evidence.

Given the trial judge's decision to admit the audio recording of the administrative hearing, Baehm-Noble's attorney then requested that the court redact the hearing officer's comment that three of Baehm-Noble's medications were "very, very strong controlled substances." The defense attorney argued that the hearing officer's statement was prejudicial. The trial judge ultimately declined to require the prosecutor to redact the hearing officer's statement, viewing Baehm-Noble's response to the hearing officer as an admission that she was on those three medications. But the trial judge recognized that the hearing officer's personal opinion as to the strength of the medications was not relevant, and the court invited defense counsel to draft a limiting instruction directing the jury to disregard the hearing officer's opinion. Defense counsel did not do so.

Based on the court's ruling, the State played portions of the administrative hearing for the jury. In addition, both Officer Gilbert and a backup officer testified on behalf of the Municipality, recounting their observations and interactions with Baehm-Noble before her arrest. Alaska Crime Laboratory employee Charles Foster also testified as an expert on the physiological effects of alcohol consumption, alcohol absorption and elimination, and drug identification and analysis. Foster opined that it would be very unlikely for a person to produce a breath test result of .066 if the person had consumed

only one standard alcoholic beverage, particularly an hour prior to the test. Foster further testified that oxycodone, hydrocodone, and methadone were all controlled substances in the same class of opioid analgesics, generally prescribed for pain relief.

The jury found Baehm-Noble guilty of operating under the influence.

Baehm-Noble's arguments regarding admission of the audio recording of the administrative hearing

On appeal, Baehm-Noble argues that the trial court erred in admitting the audio recording of the administrative hearing — in particular, her own statements and the hearing officer's opinion regarding the strength of three of Baehm-Noble's medications.

Baehm-Noble acknowledges that her statements at the administrative hearing were statements of a party opponent under Alaska Evidence Rule 801(d)(2), and that they therefore did not constitute hearsay. But Baehm-Noble argues that her statements regarding her medications were inadmissible under Alaska Evidence Rule 403 because they were more prejudicial than probative — in particular, because there was no testimony as to when Baehm-Noble consumed her last doses or what dosage she was prescribed. Without these details, Baehm-Noble argues, the jury could only speculate about the impact of the medications on Baehm-Noble's level of impairment.

We have reviewed the record and conclude that the trial judge did not abuse her discretion in admitting Baehm-Noble's statements to the hearing officer. As an initial matter, we note that Baehm-Noble's statement to the hearing officer that she took ten medications was cumulative of her on-scene statement to Officer Gilbert, which was admitted through Officer Gilbert's testimony without objection. Additionally, we note that, at the administrative hearing, Baehm-Noble herself implicitly acknowledged that the substances she ingested could be impairing because she reported that her doctor had

limited her to a single alcoholic beverage. And at trial, the crime lab expert testified that the three specifically-identified drugs (methadone, oxycodone, and hydrocodone) are opioid analgesics, generally prescribed for pain relief.

Baehm-Noble also argues that the court's admission of her statements from the impoundment hearing violated her due process rights because the hearing officer failed to inform Baehm-Noble that she had a right to remain silent or that her testimony could be used against her in her subsequent criminal trial. The trial court did not rule on this argument, and it is raised by Baehm-Noble for the first time in her reply brief. Accordingly, it is waived for appellate review.[2]

(We note, however, that the record indicates that Baehm-Noble appeared voluntarily as a witness at the impoundment hearing. Further, there is no indication that she asserted her privilege against self-incrimination or that she was coerced into surrendering this privilege and giving testimony.[3])

The harder question in this case appears to be whether the trial court erroneously admitted the hearing officer's comment that methadone, oxycodone, and hydrocodone were "very, very strong controlled substances." Baehm-Noble argues that

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[2] *See Berezyuk v. State*, 282 P.3d 386, 400-01 (Alaska App. 2012) (recognizing that issues raised for the first time in a reply brief are waived); *Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) (noting that a defendant must obtain an adverse ruling from the trial court in order to preserve an issue for appeal).

[3] *See State v. Rivers*, 146 P.3d 999, 1003 (Alaska App. 2006) (holding that when a witness in trial wants to exercise her right against self-incrimination, the witness is required to explicitly do so); *see also id.* at 1004 (Mannheimer, J., concurring) (elaborating that while a person summoned to a court proceeding or agency hearing has the right to assert the privilege against self-incrimination and refuse to answer certain questions, that privilege is waived if the person fails to assert this privilege and instead answers the questions — even if the person was never explicitly warned that she had the legal right to refuse to give potentially incriminating answers).

the hearing officer's personal opinion was hearsay, and that the hearing officer's unavailability for cross-examination violated her right to confrontation under the United States and Alaska Constitutions.[4]

Because Baehm-Noble did not raise a confrontation clause objection in the trial court, we must evaluate the trial court's ruling as a matter of plain error. Plain error is an error that: (1) is not the result of intelligent waiver or a tactical decision not to object; (2) is obvious; (3) affects substantial rights; and (4) is prejudicial.[5]

The admission of the hearing officer's statement was not obviously error under the confrontation clause. Here is the contested exchange:

> *Hearing Officer*: Okay, these are — included on this list are some very, very strong controlled substances —
>
> *Baehm-Noble*: Yes, ma'am.
>
> *Hearing Officer*: — methadone, oxycodone, hydrocodone.
>
> *Baehm-Noble*: I — I've been on a hell of a lot stronger meds.

As we noted earlier, Baehm-Noble's statements were admissible as statements of a party opponent. The statements or questions posed to her by the hearing officer were arguably admissible for a non-hearsay purpose: to provide context for Baehm-Noble's answers. If used for this purpose, the statements of the hearing officer were not offered for the truth of the matter asserted, were not hearsay, and thus, were not testimonial for purposes of the confrontation clause.[6]

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[4] U.S. Const. amend. VI; Alaska Const. art. I, § 11.

[5] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

[6] *See Estes v. State*, 249 P.3d 313, 316 (Alaska App. 2011).

Indeed, although Baehm-Noble's argument in the trial court was not explicitly framed as a confrontation clause objection, the judge characterized Baehm-Noble's response to this exchange as "an adoption" — that is, an adoptive admission that she had been taking methadone, oxycodone, and hydrocodone. Thus, we cannot say that the trial court's admission of the hearing officer's statement obviously violated Baehm-Noble's confrontation rights.

We acknowledge that the jury was not instructed to limit its consideration of the hearing officer's statement to this non-hearsay purpose. And it is possible that, without such an instruction, the jury might have relied on the hearing officer's statement — which was not the statement of a qualified expert but instead essentially a statement of the officer's personal opinion — as substantive evidence of the effect of Baehm-Noble's medications.

But the trial judge invited Baehm-Noble's attorney to draft a limiting instruction to cure this problem. The judge recognized that the hearing officer's personal opinion on the strength of the medications was not relevant, and the judge told Baehm-Noble's attorney that he could draft an instruction informing the jury that "the hearing officer's opinion is not relevant and should not sway [their] opinion." After further discussion, the judge reiterated her invitation, proposing the following possible language: "You have heard an opinion by the hearing officer regarding the controlled substances. You should disregard that opinion." Defense counsel responded that he would consider the judge's proposal, but he added that "[i]t might not even be worth doing." Ultimately, the attorney did not revisit this issue, and he did not request a limiting instruction.

Given the trial court's offer of a limiting instruction, Baehm-Noble must now establish that such an instruction would not have been an adequate remedy.[7] But

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[7] *Cf. Adams v. State*, 359 P.3d 990, 995 (Alaska App. 2015) (holding that, after the (continued...)

on appeal, Baehm-Noble does not even discuss the trial judge's reasoning or the judge's offer to give a limiting instruction.

We note that Baehm-Noble's own statements minimized the impact of the hearing officer's opinion. As we have explained, she responded to the hearing officer's comment by declaring that she had taken much stronger medication in the past. She also told the hearing officer that she was authorized to drive while taking her medications.

Moreover, there was no dispute that Baehm-Noble was on ten different medications at the time that she was arrested for operating under the influence. The jury heard the audio of the traffic stop in which Baehm-Noble reported this fact directly to Officer Gilbert. Additionally, the crime lab expert, Charles Foster, testified that the medications identified during the administrative hearing (methadone, oxycodone, and hydrocodone) were opioid analgesics, generally prescribed for pain relief.

Furthermore, the prosecutor did not mention the hearing officer's comment at all during his closing arguments. Rather, the prosecutor relied primarily on Officer Gilbert's testimony regarding Baehm-Noble's demeanor and conduct at the time she was stopped and arrested, including the fact that she spun her vehicle tires, despite the lack of ice on the road; that she admitted to consuming alcohol (and changed her story about what she had to drink); that she was on ten different medications; that she was swaying back and forth and had bloodshot eyes and an odor of alcohol; and that she performed poorly on all of the field sobriety tests.

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[7] (...continued)
defendant rejected the court's offer to continue the trial, the court did not abuse its discretion in denying defendant's alternative remedy because defendant failed to explain why the offered continuance was inadequate); *Hamilton v. State*, 59 P.3d 760, 768 (Alaska App. 2002) (holding that, where the trial court sustained the defense attorney's objection to the witness's testimony and gave a curative instruction, the appellant had to demonstrate on appeal that the instruction was an inadequate remedy and that he was entitled to a mistrial).

In addition, the jury heard the audio recording of the stop and could evaluate Baehm-Noble's performance on the field sobriety tests for themselves. The jury also heard the crime lab expert's opinion that it was implausible that consuming one standard drink would result in a BAC of .066 (thus contradicting Baehm-Noble's report that she only consumed one alcoholic drink).

We therefore conclude that the trial court did not commit plain error in admitting the hearing officer's statement, and we reject Baehm-Noble's challenges to the admission of the administrative hearing audio recording.

Sufficiency of the evidence

Baehm-Noble also argues that there was insufficient evidence to support her conviction. But viewing the evidence outlined above in the light most favorable to the jury's verdict, the evidence was sufficient to support Baehm-Noble's conviction for operating under the influence.[8]

Conclusion

We AFFIRM the judgment of the district court.

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[8] *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).